

UNCLASSIFIED

RELEASED IN PART
B5

CE 249

Distr.
RESTRICTED

E/CN.4/2003/WG.22/CRP.3/Rev.1
16 January 2003

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Intersessional open-ended Working Group to elaborate
a draft legally binding normative instrument for the
protection of all persons from enforced disappearance
First session
Geneva, 6-17 January 2003

DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS

A. Definition

1. The delegations took the view that the definition of enforced disappearance should contain at least three constituent elements:

- (a) Deprivation of liberty in whatever form;
- (b) Refusal to acknowledge that deprivation of liberty;
- (c) Removal of the disappeared person from the protection of the law.

2. The definition must also take into consideration the perpetrators of the enforced disappearance. In this respect, many delegations considered that the instrument should in the first place refer to agents of the State and ~~related persons~~. Some delegations thought it would be worth examining the role

B5
B5

GE.03-10253 (E) 140103 140103

UNCLASSIFIED

UNCLASSIFIED

E/CN.4/2003/WG.22/CRP.3
page 2

and situation of persons commonly called "non-State actors". For most delegations, States bore the prime responsibility for preventing and punishing enforced disappearances, including those perpetrated by non-State actors, ~~and~~ ensure reparation. [redacted] B5 B5

3. Other aspects were mentioned: the duration of enforced disappearances, the implementation of the instrument in time of warfare, and ~~the~~ possible causes of exemption in case of internal disturbances. [redacted]

B. Definition of offences and penalties

B5

Enforced disappearance as an independent offence in domestic criminal law

4. According to some delegations, States should ensure that each act leading to an enforced disappearance constitute an offence under their criminal law. In the view of the other participants, States should have to define enforced disappearance as an independent offence in their domestic criminal law. That would better reflect the complexity of enforced disappearances, would make criminal sanctions more effective and would make it easier to establish rules concerning specific aspects on the offence, such as statutory limitation, exemption of responsibility and extradition. It was recalled that the institution of independent offences in domestic law was supported by the Committee against Torture, the Special Rapporteur on torture and the Working Group on Enforced Disappearances.

5. In the opinion of several delegations, the future instrument should take account of the diversity of national law systems. [redacted] B5

Enforced disappearance as a crime against humanity

6. Most speakers wished that the systematic or massive practice of enforced disappearances should be referred to in the instrument as a crime against humanity. Several speakers pointed out that the systematic nature of violations implied forward planning.

The subjective element as a constituent element of the offence of enforced disappearance

7. According to article 2, paragraph 1, of the Sub-Commission's draft, the perpetrators of the offence of forced disappearance should be punishable only if they knew or ought to have known that the offence was about to be or was in the process of being committed. In the same [redacted] B5

UNCLASSIFIED

spirit, article 3, paragraph 2, of the draft suggested that the perpetrators of forced disappearances constituting crimes against humanity should be charged only where they knew or ought to have known that the act was part of a systematic or massive practice of forced disappearances. Several speakers took the view that, for the sake of the effectiveness of criminal justice, such limitations should not be included in the future instrument. Other participants, on the other hand, thought that the clause was worth preserving.

8. The Chairperson concluded the debate in the following way:

- Enforced disappearances constitute crimes. However, the question remained of defining the offence of enforced disappearance as an independent offence in domestic law;
- The Working Group will have to specify under what circumstances, if any, certain enforced disappearances should be considered as crimes against humanity (massive, systematic, or widespread character);
- The Working Group identified the main elements of incrimination (attempt, conspiracy, collusion, instigation and incitement). It should consider with greater detail the issues of dissimulation, responsibility incurred for the failure to act, and the responsibility of hierarchical superiors;
- With regard to sanctions, the Working Group might use the sort of wording used in existing texts, and in the Sub-Commission's draft, whereby penalties should be adequate and proportional to the gravity of the offence.

B5